Supreme Court, U.S.
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NO. 82-228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES BARRETT and HARRY F. OLSON,
Petitioners,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF SOUTH CAROLINA

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QUESTION PRESENTED

1. Does the First Amendment to the United States Constitution allow the State of South Carolina to set community standards at a level of decency rather than at a level of tolerance in determining whether an item is patently offensive?

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NO. _____

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion and order of the Supreme Court of South Carolina in the above case filed on June 8, 1982.

OPINION BELOW

The opinion of the Supreme Court of South Carolina affirming the judgment of the Trial Court is not yet reported, but is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on June 8, 1982. This Petition for Writ of Certiorari is timely filed. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix B hereto.

STATEMENT OF THE CASE

The Petitioners, James Barrett and Harry F. Olson, were separately indicted and found guilty of a violation of Section 16-15-260, *et seq.*, Code of Laws of South Carolina (1976), as amended. The charges were predicated upon purchase of various press materials at the place of business where the Defendants were allegedly employed. Petitioners were tried by a jury. At the conclusion of the trial, the jury found the Petitioners guilty. They thereafter appealed their convictions to the Supreme Court of South Carolina in a consolidated appeal which affirmed the Trial Court judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASON FOR GRANTING WRIT

It is Repugnant to the First Amendment of the United States Constitution for a State to Set Community Standards at a Level of Decency Rather Than at a Level of Tolerance in Determining Whether Press Materials are Patently Offensive.

This issue especially merits review because the decision of the Supreme Court of South Carolina conflicts with the implicit teachings of this Court and the explicit teachings of the Fifth Circuit Court of Appeals in the case of *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d 1020 (5th Cir.) (1981). The Fifth Circuit in *Red Bluff* was examining a Texas statute which, as gleaned from the opinion, is identical to that of the South Carolina statute at least insofar as the Petitioner is complaining in this Petition. The Fifth Circuit found the issue of whether Texas had exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" to be a significant question. *Red Bluff Drive-In, Inc. v. Vance*, 648 F.2d at 1029. The Fifth Circuit, however, abstained because of the pendency of ongoing state criminal proceedings in which that issue could have been resolved by narrowing jury instructions. The Fifth Circuit affirmed the District Court's abstention. The curative jury instructions which the Fifth Circuit alluded to in *Red Bluff* are absent from the jury instructions given in the Trial Court below in South Carolina.

Following the *Red Bluff, Id.* opinion of the Fifth Circuit, the State of Texas had occasion to rule on the identical question raised in this petition in the case of *Andrews v. Texas*, No. 01-81-0270-CR, Court of Appeals, First Supreme Judicial District, appeal filed May 6, 1982. In *Andrews*, the Texas Court of Appeals reversed the Trial Court which instructed the jury on the exact same definition of patently offensive as is found in the South Carolina statute complained of here. That is, because the statute's definition employed a standard of community *decency* rather than community tolerance. The Texas Court of Appeals ruled:

> "The word 'decency' is generally defined as propriety of conduct, speech, and behavior conforming to approved social standards. The word 'tolerance' is generally defined as the capacity for or practice of recognizing and respecting the opinions, practices, or behavior of others. The two words have very different connotations when used in terms of public opinion, as 'decency' refers to society's willing approval of behavior, and 'tolerance' to its reluctant acceptance of behavior. It has been held that a charge which instructs the jury to judge allegedly obscene material by standards of community decency, rather than of community tolerance, violates First Amendment guarantees of freedom of expression. *Smith v. U.S.*, 431 U.S. 291, 97 S.Ct. 1756 (1977). The court's charge in the case at bar improperly charged the jury that they might convict the appellant if they found the magazine in question was so offensive on its face as to affront current community standards of decency. This charge permitted the jury to evaluate the magazine not as an expression which the community regards as being less than decent. Thus, the court's definition was erroneous, and for the reasons previously stated, the court's charge constituted reversible error.

Red Bluff, supra.

The "tolerance" test is set forth in *Smith v. United States* 431 U.S. 291 at 305 (1977) where this Court, in the course of its discussion of prurient interest in patent offensiveness observes:

> "[C]ontemporary community standards must be applied by juries in accordance with their understanding of the *tolerance* of the average person in their community. . . ."

(Emphasis added.) In other cases, the word tolerant is used fluently. See, for example, *Miller v. California*, 413 U.S. 15 (1973):

> "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas, or New York City. People

in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity."

(Emphasis added.) 413 U.S. 13, 32.

In *Pinkus v. United States*, 432 U.S. 293 (1978), the Court has held...

"local standards rather than national standards should be applied. *Hamling v. U.S., supra*. Similarly, obscenity is to be judged according to the average person in the community rather than the most prudish or the most *tolerant*...."

(Emphasis added.) *Id.*, at 293.

And most recently, in the case of *New York v. Ferber*, _____ U.S. _____, 31 Criminal Law Reporter, 3139 at 3143, footnote 12:

"In addition, legal obscenity under *Miller* is a function of 'contemporary community standards.' 413 U.S. at 24. It is neither realistic nor constitutionally sound to read the First Amendment as requiring of the people of Maine or Mississippi accept public depiction of conduct found *tolerable* in Las Vegas or New York City. *Id.*, at 32. It would be equally unrealistic to equate a community's *toleration* for sexually explicit material with the permissible scope of legislation aimed at protecting children from sexual exploitation."

(Emphasis supplied.)

Clearly, the multiple references by this Court in *Miller* and its progeny to the words "toierable", "tolerant", and "toleration" refer to a community standard of "tolerating" beliefs and behaviors of others within a community rather than a community finding the material to be distasteful to the community standards of decency. The Tennessee Supreme Court in *Leech v. American Booksellers Association, Inc.*, 582 S.W.2d 738 (Tenn. 1979), interpreted the tolerance test set forth by *Miller* and its progeny in the following terms:

"It is obvious that the acceptance test would lead to the indiscriminate branding as obscene much of protected speech that would otherwise pass the tolerance test. As we have heretofore noted, we cannot encroach further

upon the freedom of speech and press and the *Miller* standards permit, as a matter of federal constitutional law."

582 S.W.2d 738, 748.

Contrary to the Supreme Court of South Carolina's ruling, Section 16-15-260 is unconstitutional. The full text of Section 16-15-260 reads as follows:

Definitions.

As used in Sections 16-15-270 through 16-15-440:

(a) "Obscene or obscenity" means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational or scientific value. In order for any matter to be determined "obscene" the trier of fact must find:

(1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and

(2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and

(3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(b) "Prurient Interest" means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(c) "Patently Offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

The issue raised in the Supreme Court of South Carolina is as follows:

Section 16-15-260 of the South Carolina Code is unconstitutional on its face and/or as applied to the

> Petitioner herein and is violative of his First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution and under the applicable corollary to the South Carolina Constitution.

The Supreme Court of South Carolina did not address the substance of the complaint to the constitutionality of the statute, rather they chose to say that counsel for the Petitioners "picketh the nit." They went on to say that although the materials were not before them for examination, there is no doubt that they were obscene because of what was printed in the record. This summary answer to the complaints of Petitioners should not be allowed to remain the law of the State of South Carolina. This would significantly encroach upon the First Amendment rights of the citizens of South Carolina because a citizen could be convicted of disseminating material which displeases a community's standards of decency and propriety within the community rather than a community's sense of tolerance of what other adults in the community can see and read.

It is clear from the teachings of this Court, the Fifth Circuit Court of Appeals, the Tennessee Supreme Court and the Texas Court of Appeals that the patently offensive definition in the South Carolina law is a subtle but significant change in the constitutional dimensions allowed by the *Miller* decision. It is, therefore, apparent that this deviation in the law of community standards unconstitutionally infringes upon the rights secured Petitioners by the Constitution of the United States.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the opinion and judgment by the Supreme Court of South Carolina.

Respectfully submitted,

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

James Barrett, ... Appellant.

and

The State, ... Respondent,

v.

Harry F. Olson, ... Appellant.
(two cases)

Appeal From Richland County
John B. Grimball, Judge

Opinion No. 21722
Filed June 8, 1982

AFFIRMED

Charles W. Boyle, of Atlanta, Georgia; and Franchot A. Brown, of Columbia, for appellants.

Attorney General Daniel R. McLeod, Senior Assistant Attorney General Brian P. Gibbes, Assistant Attorneys General Lindy P. Funkhouser and Martha L. McElveen, and Solicitor James C. Anders, all of Columbia, for respondent.

LITTLEJOHN, A.J.: These two obscenity cases have been consolidated for the purpose of this appeal. The separate briefs are substantially identical. The two Defendants were indicted in April of 1981 and found guilty of a violation of § 16-15-260, *et. seq.*, *Code of Laws of South Carolina* (1976), as amended. From the convictions and sentences both have appealed, submitting the same issues as questions for this court.

The proscribing statute is as follows:

> § 16-15-320. Creation, possession, purchase or importation of obscene material with intent to distribute; dissemination and promotion of such material.
>
> It shall be unlawful for any person to:
>
> (a) send knowingly or cause to be sent, to bring or cause to be brought into the State for sale or distribution, to prepare, publish, print, exhibit, distribute or to offer to distribute in the State, or to have in his possession with intent to distribute or to exhibit or to offer to distribute any obscene matter;
>
> (b) intentionally disseminate obscenity in any public place;
>
> (c) advertise or otherwise promote the sale of material represented or held out by such person as obscene;
>
> (d) knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.
>
> Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be punished as provided in § 16-15-430.

It is well established that obscene materials are not protected by the First Amendment of the Constitution of the United States, or the corresponding provision of the Constitution of South Carolina.

Section 16-15-260 undertakes to define obscenity, in relative part, as follows:

> Definitions.
>
> As used in § § 16-15-270 through 16-15-440:

(a) "Obscene or obscenity" means any work, material or performance which, taken as a whole, appeals to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, educational or scientific value. In order for any matter to be determined "obscene" the trier of fact must find:

(1) that the average person, applying contemporary community standards would find that the matter taken as a whole, appeals to the prurient interest, and

(2) that the matter depicts, or describes, in a patently offensive way, sexual conduct specifically defined by this Section or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as the phrase is used in the definition of obscene, and

(3) that the matter taken as a whole, lacks serious literary, artistic, political, educational, or scientific value.

(b) "Prurient Interest" means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

(c) "Patently Offensive" means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

The first issue submitted to the Court, as taken from the briefs of the Appellants, is as follows:

Section 16-15-260 of the South Carolina Code is unconstitutional on its face and/or as applied to the Petitioner herein and is violative of his First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution and under the applicable corollary to the South Carolina Constitution.

In the brief of Appellants, the following admission is made:

> Except for § 16-15-260(b)(c), the statute is constitutionally unobjectionable. However, the general assembly went beyond the *Miller* standards and infringed upon the constitutional rights of citizens such as the Defendant herein when it defined prurient interest as reflective of an arousal of lewd and lascivious desires and thoughts.

The case of *Miller* referred to in counsel's brief is *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 92 S.Ct. 2607 (1973). In this case, the Supreme Court of the United States attempted to clarify the law for the state and federal law makers and courts in the problem of dealing with obscenity and pornography. It is obvious that the Court fully appreciated the legislative problems of defining obscenity when it said:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts.
>
> . . . .
>
> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

We hold that the guidelines set forth in *Miller* to regulate obscenity have not been infringed by the statute and its application here. It is obvious that the variations, one of which (complained of) actually is advantageous to the Appellants. Our statute includes in the definition of "prurient interest" a requirement that the matter also be ". . .reflective of an arousal of lewd and lascivious desires and thoughts." Contrary to the argument of counsel, we think that this portion of the definition increases the burden of the government before conviction may be had.

Appellants contend that subsection (c) is unconstitutional because of a substitution of community standards of decency

and propriety for community standards of tolerance, citing *Red Bluff Drive-In, Inc. v. Vance*, 745 F.2d 1020 (5th Cir.) (1981). In this case, the Fifth Circuit Court of Appeals refused to declare a similar statute unconstitutional.

It can be forcefully argued that obscenity must be obscenity in every state or in none. At the same time, it is the law, as declared by the Supreme Court of the United States, that contemporary community standards may be considered, and, accordingly, constitution. Obscenity, like many other words, may be defined correctly in different ways. No particular verbage is required to define obscenity. Certainly the Supreme Court of the United States has not undertaken to specify the verbage to be used by the respective legislatures.

Here, as is typical in obscenity cases, counsel "picketh the nit." Squabbles over technicalities and definitions have lured the courst to write fluently, resulting, ofttimes, in overdefining obscenity. We appreciate the fact that obscenity is difficult to define; fortunately, it is not so difficult to detect. The printed material in contest here was not entered as exhibits in this Court, but quotations therefrom appear in the record. It is difficult to conceive of any definition which would not cover that which is printed in the record. Obviously, jurors applying contemporary community standards, concluded that the matter was obscene and proscribed. We, applying the same standards, agree.

Our statute is not so broad as to overcome the presumption of constitutionality. We refuse to declare it invalid.

The Appellants next contend that:

> The trial court erred in allowing the state to proceed with an original trial against [Appellants] even (sic) [though] there was no preliminary hearing and no judicial determination of obscenity as is required under § 16-15-270 of the South Carolina Code.

Code § 16-15-270, in relevant part, is as follows:

> § 16-15-270. Judicial determination of obscenity; procedure; warrants or orders of seizure; temporary restraining orders; contempt.
>
> (a) The purpose of this section is to provide a judicial determination of the question of whether

books, magazines, motion pictures or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials.

. . . .

(c) Whenever any law enforcement officer has reasonable cause to believe that any person is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of § 16-15-260, he shall, *without seizing* such material, notify the solicitor for the judicial circuit in which such material is so believed to be offered. Upon receiving such notification the solicitor for such judicial circuit shall investigate the law enforcement officer's report to determine whether or not sufficient cause exists *to seek warrants of search and seizure*. If the solicitor determines that sufficient cause does exist, he shall apply to a circuit judge sitting in the judicial circuit where the allegedly obscene material is located for warrants. (Emphasis added.)

(d) A circuit judge may *issue warrants for search and seizure to authorize seizure* of single copies of suspect material in order to preserve evidence, but only after he has determined the existence of probable cause based upon a viewing of the allegedly obscene material itself or upon examination of factual allegations contained in any affidavit in support of such warrant. (Emphasis added.)

. . . .

(g) Nothing contained in this section shall prevent the obtaining of material by purchase or by production under the provisions of § 16-15-270.

. . . .

It is apparent that this code section is designed to protect merchants of printed material from searches and seizures which might be determined unwarranted. The protection is a limitation on search and seizure; it is not a limitation on prosecution.

The undisputed facts in this case are that police officers went to the stores where the Appellants worked, bought and paid for printed material. They proceeded to prosecute the Appellants in the usual fashion. It is their contention that they were entitled to a judicial determination of whether the material was obscene ". . .prior to their seizure or prior to criminal prosecution relating to such materials." They argue that no prosecution can be had before the materials are submitted to a circuit judge and found to be obscene. In *The State v. Oxendine*, 268 S.C. 828, 233 S.E.2d 118 (1977), in construing a similar statute now repealed, this Court held that:

> . . .where the alleged obscene matter is purchased there is no necessity for such a procedure, since the owner has voluntarily relinquished his rights therein. The preliminary hearing procedure provided by § 43-232 of the Code amply protects the rights of the accused under such circumstances.

While the statute involved in *Oxendine* is not exactly the statute involved here, we think that the rationale is similarly applicable. In cases, such as here, where there is no seizure, a determination by a circuit judge is not required. We think that a reasonable interpretation of the statute, quoted hereinabove, is that a judicial hearing by a circuit judge must be held prior to seizure, but if not held prior to seizure, at least must, upon request, be held after seizure prior to ". . .criminal prosecution relating to such materials."

It is obvious that the Legislature recognizes that the rights of a dispenser of literature are different when property is taken against the will of the owner and, on the other hand, when the owner parts with the same in exchange for money.

We find all exceptions without merit and the verdicts and sentences of the lower court are, hereby

AFFIRMED.

LEWIS, C.J., NESS, GREGORY and HARWELL, JJ., concur.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law. . .abridging the freedom of speech, or the press. . . ."

2. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Is Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and does it violate the First, Sixth and Fourteenth Amendments of the United States Constitution?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21722, filed June 8, 1982, as reproduced in Petitioners' Appendix A.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

Is Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and does it violate the First, Sixth and Fourteenth Amendments of the United States Constitution?

ARGUMENT

Section 16-15-260, 1976 Code of Laws of South Carolina, as amended, is constitutional on its face and as applied to Petitioners in that it complies with the guidelines set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S.Ct. 2607 (1973) and does not violate the First, Sixth and Fourteenth Amendments of the United States Constitution.

Petitioners were convicted of distributing obscene materials pursuant to §16-15-260, et seq., 1976 Code of Laws of South Carolina, as amended. By exceptions and at brief on appeal, Petitioners specifically claim that §16-15-260, 1976 Code of Laws of South Carolina, as amended, is unconstitutional, contending that subsections (b) and (c) of this statute exceed the standards set forth in Miller v. California, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) and are violative of Petitioners' First, Sixth and Fourteenth Amendment rights as guaranteed by the United States Constitution. Petitioners contend that the remainder of §16-15-260 is constitutionally unobjectionable. Respondent respectfully submits that the statute in its entirety is constitutionally sound and that Petitioners' claims and contentions are without merit.

As Petitioners note, Miller v. California, supra, provides guidelines which must be used to identify obscene material so that a State may regulate obscenity without infringing upon the First Amendment as applicable to the States through the Fourteenth Amendment. In order for any work to be declared obscene, it must be determined (1) that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest, (2) that the conduct described or depicted in the work is "patently offensive" as specifically defined by State law and, (3) that the work, taken as a whole, lacks serious social value. Miller also reaffirmed the Roth v. United States, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), reh. denied, 355 U.S. 852, decision that obscene material is not protected by the First Amendment; abandoned

the Memoirs v. Massachusetts, 383 U.S. 413, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1976) "utterly without redeeming social value" test for obscenity' and redefined the Roth community standard to specify that obscenity shall be determined by applying contemporary community standards rather than a national community standard.

Along with the holdings set forth in Miller, this Court also provided examples of what a state statute could define for regulation under the guidelines of the opinion. Petitioners appear to contend that, because §16-15-260 is not a carbon copy of the Miller, examples, the statute is unconstitutional. However, when providing the above-mentioned examples, this Court specifically cautioned:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. 37 L. Ed. 2d 419, 431.

This caveat was reiterated in the later case

of Hamling v. United States, 418 U.S. 87, 41 L. Ed. 2d 590, 94 S. Ct. 2887 (1974).

> The Miller cases, important as they were in enunciating a constitutional test for obscenity...were intended neither as legislative drafting handbooks nor as manuals for jury instruction. 41 L. Ed. 2d 590, 619.

In light of this, Respondent asserts that the inclusion of subsections (b) and (c) in §16-15-270 does not render the statute unconstitutional. Although neither subsection is specifically included in the Miller opinion, each subsection is within the constitutional guidelines set forth in that opinion.

Section 16-15-260 (b), 1976 Code of Laws of South Carolina, as amended, reads as follows:

> (b) 'Prurient interest' means a shameful or morbid interest in nudity, sex or excretion and is reflective of an arousal of lewd and lascivious desires and thoughts.

Petitioners object solely to the portion of §16-15-260 (b) which defines "prurient

interest" as "reflective of an arousal of lewd and lacivious desires and thoughts," conceding that the remainder of the definition complies with Miller. Respondent respectfully submits that the allegedly objectionable portion is a valid definition of the term "prurient interest." Webster's New International Dictionary (Unabridged, 2d Edition, 1949) defines prurient as "uneasy with desire or longing; lascivious desire or thought." (emphasis added) The American Heritage Dictionary (New College Edition, 1978) also defines prurient as "obsessively interested in improper matters, especially of a sexual nature; arousing or appealing to such an interest." And, Black's Law Dictionary (5th Edition, 1979) defines prurient interest as "[a] shameful or morbid interest in nudity, sex, or excretion... 'prurient' means having lustful ideas or desires...an obsessive interest in immoral

and lascivious matters." (emphasis added). It is therefore obvious that the definition of prurient interest set forth in §16-15-260 (b) is a standard definition. Furthermore, Roth v. United States, supra, defines prurient interest as material tending to excite lustful thoughts. Because the Miller decision neither rejects this definition nor redefines prurient interest, Respondent submits that the Roth definition is constitutionally sound. Respondent therefore asserts that §16-15-260 (b) provides a constitutionally sound and linguistically correct definition of the term prurient interest.

If, as Petitioners contend, §16-15-260 (b) adds to the definition of prurient interest provided in Miller, Respondent submits that the additional language narrows rather than broadens the standards necessary to prove a work is obscene. The subsection

in question requires that the prosecution show that a work produces a morbid interest and reflects lewd thoughts in order to have a work declared obscene. This requirement increases the prosecutorial burden and produces a standard which is more stringent than the Miller standard. This Court has specifically held that, where a statute imposes a greater burden on the prosecution than does Miller, there is no constitutional violation. See Hamling v. United States, supra; Ward v. Illinois, 431 U.S. 767, 52 L. Ed. 2d 738, 97 S. Ct. 2085 (1977). Since Miller permits the imposition of a lesser burden on the prosecution than does §16-15-260 (b), Petitioners would derive no benefit from the use of the Miller standard and suffers no constitutional prejudice from the application of the current South Carolina statute.

Respondent also objects to §16-15-260 (c) which provides as follows:

> (c) 'patently offensive' means obviously and clearly disagreeable, objectionable, repugnant, displeasing, distasteful, or obnoxious to contemporary standards of decency and propriety within the community.

Petitioners allege that this subsection is unconstitutional because it substitutes community standards of decency for community standards of tolerance, citing Red Bluff Drive In, Inc. v. Vance, 648 F. 2d 1020 (5th Cir. 1981), reh. denied, 656 F. 2d 700 and Smith v. United States, 431 U.S. 291, 52 L. Ed. 2d 324, 97 S. Ct. 1756 (1977) as support.

In Red Bluff, the Fifth Circuit Court of Appeals refused to declare a similar Texas statute was unconstitutional finding that

> [w]hether Texas has exceeded its constitutional authority to regulate obscenity by defining "patently offensive" in terms of "decency" rather than "tolerance" is a significant question. But before the constitutional issue can be resolved, the interpretation

> of the critical word must be left to the State courts.... If on its face the statute warned too broadly, deference to the State courts would be inappropriate. Such is not the case here. There is ample room to formulate jury instructions that comport with...the First Amendment rights of defendant charged with obscenity offenses. (emphasis added). 648 F. 2d 1020, 1029.

In finding that jury instructions can make a somewhat broad statutory definition constitutionally sound, Red Bluff followed the direction of this Court in the post Miller decision in Smith v. United States, supra, which found as follows:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in the community does not mean...that obscenity convictions will be virtually unreviewable... [J]uries must be instructed so that they consider the entire community and not simply their own subjective reactions. 52 L. Ed. 2d 324, 338.

Respondent submits that, like the Red Bluff statute, §16-15-260 (§16-15-260 (c)

specifically) is not on its face so broad that it is without a doubt unconstitutional. Respondent further submits that any problems with the statute were corrected by the trial court's instructions to the jury. During charges to the jury the trial court instructed on this issue on several occasions. These instructions clearly indicate that the jury was advised to use the average man community standard set forth in Miller.

Petitioners further contend that §16-15-300 is unconstitutional, claiming that it presumes intent as against defendant:

> (a) A person who possesses two or more copies of identical obscene material or ten or more copies of similar obscene material is presumed to possess them with intent to distribute them and (b) a person who manufactures, prepares, publishes or prints an obscene material in two or more copies is presumed to do so that the material shall be made available to the public.

Respondent submits §16-15-300 does not presume criminal intent. Nor does it presume a work to be obscene. The statute merely declares that, if a work is found to be obscene and the defendant has two or more copies of that identical work, he is presumed to be a distributor. The trial court clearly instructed the jury that the prosecution must prove guilt.

Respondent respectfully submits that the above arguments negate Petitioners' complaints against the obscenity statutes of our State. These statutes are constitutionally sound and in compliance with the Miller guidelines. Respondent therefore requests that this Court declare these statutes constitutional and affirm the convictions of Petitioners.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioners' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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